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UNITED STATES SUPREME COURT

OCTOBER, 1983 TERM

ARIZONA PUBLIC SERVICE COMPANY, Petitioner, v. NATIONAL LABOR RELATIONS BOARD, Respondent, and INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, LOCAL 387.	PETITIONER'S REPLY TO BRIEF OF THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATUTES, RULES REGULATIONS . . .	iv
JURISDICTIONAL STATEMENT	1
ARGUMENT	1
I. Barganing History . . .	1
II. Baltimore Gas Doctrine Does Not Deprive Employees Of Their Section 7 and 9 Rights	4
CONCLUSION	11

TABLE OF AUTHORITIES

	Page
American Ship Building Co. v. NLRB, 380 U.S. 300 (1965)	12,13
The Bendix Corp., 168 NLRB 371 (1967)	8
Boston Gas Company, 221 NLRB 628 (1975)	10
Bureau of Alcohol, Tobacco and Firearms v. Federal Labor Relations Authority, et al., 52 U.S.L.W. 4013, 4015 (U.S. Nov. 29, 1983)	12
Comax Telcom Corp., 219 NLRB 688 (1975)	4
Duke University, 227 NLRB 1627 (1977)	4
Massachusetts Electric Company, 248 NLRB 155 (1980)	10
Metropolitan Hospital, 233 NLRB 282 (1976)	4
Mt. Sinai Hospital, 233 NLRB 507 (1977)	4
NLRB v. Erie Resistor Corp., 373 U.S. 221 (1963)	12

Page

NLRB v. Iron Workers, 434 U.S. 335 (1978) 13

Phototype Inc., 145 NLRB 1268 (1964) 4

STATUTES, RULES, REGULATIONS

	Page
NATIONAL LABOR RELATIONS ACT, 29 U.S.C. §157	10, 12
NATIONAL LABOR RELATIONS ACT, 29 U.S.C. §159	10, 12

JURISDICTION

This Reply Brief to Respondent's National Labor Relations Board[1] Response is submitted by Arizona Public Service[2] pursuant to Rules of the Supreme Court of the United States, Rule 22.5.

ARGUMENT

I. BARGAINING HISTORY

Petitioner takes exception to the NLRB's misleading statement in its Response to Petitioner's Writ of Certiorari, at page 2, which says, without more, that "[w]hen petitioner has by acquisition or construction added new plants to its system, employees at the new facilities have been incorporated into the contractual systemwide unit."

1/ Hereinafter "NLRB."

2/ Hereinafter "APS."

The NLRB's statement omits the uncontroverted fact that employees at newly acquired or constructed APS facilities were "incorporated" into the Local 387[3/] bargaining unit only after the Union achieved and proved majority status among those employees, either through prior representation, NLRB certification after an NLRB-conducted election, or merger with predecessor labor organizations. It was only on that basis that APS recognized the Union as the collective bargaining representative of newly acquired or constructed facilities' employees. (R. 461, L. 9 - R. 467, L. 18; R. 180, L.

3/ Hereinafter the "Union."

14 - R. 181, L. 25; R. 183, L. 17 - R. 184, L. 10; R. 495, L. 10-21).[4/]

In this case the Union specifically admitted that it does not represent and has never represented a majority of the Palo Verde employees. (R. 353, L. 21 - R. 354, L. 14; R. 368, L. 7-10; R. 354, L. 17 - R. 355, L. 9; R. 496, L. 12-14.) Bargaining history, thus, cannot be used to justify the "incorporation" of the Palo Verde employees into the Union's bargaining unit. To the contrary, bargaining history, as a criterion, would require the union to prove majority status, through, in this case, an election.

4/ References to the record of the underlying NLRB representation hearing are designated by "R" followed by the appropriate page number or numbers and "L" followed by the appropriate line number or numbers.

II. BALTIMORE GAS DOCTRINE DOES NOT DEPRIVE EMPLOYEES OF THEIR SECTIONS 7 AND 9 RIGHTS

The uniform and unbroken case law cited in Petitioner's Opening Brief (p. 11-12), establishes that self-determination elections are prescribed even where the distinct group might not itself constitute an appropriate separate bargaining unit. See, e.g., Mt. Sinai Hospital, 233 NLRB 507 (1977); Duke University, 227 NLRB 1627 (1977); Metropolitan Hospital, 223 NLRB 282 (1976); Comax Telcom Corp., 219 NLRB 688 (1975); Phototype Inc., 145 NLRB 1268 (1964).

There is no authority for the NLRB's novel attempt to avoid the authority of the above cases by arguing that the employee groups which were involved in those cases "worked outside the established bargaining units for a number of

years before the issue of the representational status was raised."[5/] It is respectfully submitted that employees' election rights under the Act are not to be determined by so specious a distinctions as the NLRB suggests -- that employees have a right to vote only if they or the union first sleep on their rights sufficiently long.

Furthermore, even if the foregoing NLRB argument were correct, the instant case, even by the NLRB's own argument, involves precisely the type of situation claimed by the NLRB to be appropriate for

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5/ Brief for the NLRB in Opposition, page 8, fn. 12. This patently false argument assumes that a union's failure to seek that certain employees be included within a particular bargaining unit for a number of years is somehow a prerequisite to "ripen" election rights, which the employees did not have under the Act from the first creation of the identifiable group.

a self-determination election. It is uncontroverted that the group the union and NLRB seek to incorporate into the Union's existing unit without a self-determination election "had come into existence after [the] Union's recognition but had been knowingly excluded from the unit for a substantial period of time." (Brief for the NLRB in Opposition at page 8). APS began hiring production and maintenance employees at its Palo Verde Plant as early as 1977, three years before the filing of the petitions. (R. 29, L. 7-13; R. 64, L. 24 - R. 65, L. 10; Brief for the NLRB in Opposition at page 2).

Not a single one of the three collective bargaining agreements negotiated by APS and the Union since 1977 has included the Palo Verde employees. Article II, Section 7 of each of these agreements contains the following limiting language:

> There shall be no other classification of work or rate of pay than those mentioned in Wage Schedules attached hereto for employees within the bargaining unit. . . .

These consistent omissions, prior to the Union's formal demand for recognition, (filing of UC petition on December 15, 1980) demonstrate the type of "knowing exclusion from the unit" argued by the NLRB in its Brief to be an appropriate criterion for according employees a self-determination election.

Still further, the NLRB argues that a self-determination election is appropriate (on the basis of the cases cited by APS) when "the bargaining history demonstrates that exclusion has not resulted in an unstable bargaining relationship and . . . the parties themselves have recognized that exclusion does not interfere with the bargaining relationship."

This is precisely the case here, as the three collective bargaining contracts negotiated by and entered into by the parties (without strikes or lockouts) since 1977 demonstrate. As noted above, Palo Verde production and maintenance employees have been employed since 1977. The parties had knowingly excluded such employees from the Union's bargaining unit described in the contracts to this date. There is simply no evidence in the record which would establish that this exclusion of the Palo Verde employees from the bargaining unit has created an unstable bargaining relationship between the parties. As The Bendix Corp., 168 NLRB 371 (1967), cited by the Board (NLRB Brief at P.9) amply demonstrates, the filing by a union of a UC (Unit Clarification) Petition, does not create the

type of instablity sufficient to warrant limiting employee free choice.

Finally, the NLRB attempts to invoke the Baltimore Gas doctrine as justification for denying a self-determination election to the Palo Verde employees. Again, it must be emphasized that APS has never contended that the Palo Verde employees constitute an appropriate separate bargaining unit. Rather, it has always been APS' position that the Palo Verde employees comprise an identifiable separate group entitled to a self-determination election before it can be "incorporated" into the Union's existing single system-wide unit.

The Board has never argued, nor can it argue, that the choice between inclusion within, or exclusion from, a single existing system-wide collective bargaining unit (as opposed to establishment of a new separate bargaining unit) under-

mines the Baltimore Gas doctrine. Were this not true, the Baltimore Gas doctrine would have in effect forfeited the §§7 and 9 rights of all employees in the public utilities industry. Significant administrative case law to the contrary dispels any such notion. See, e.g., Massachusetts Electric Company, 248 NLRB 155, 158 (1980); Boston Gas Company, 221 NLRB 628, 630 (1975).

APS does not question, and has never questioned, the Baltimore Gas doctrine, that there should be a single system-wide bargaining unit for any public utility. APS says simply that separately indentifiable groups (as at Palo Verde) within the utility, which have never before been represented by the Union, have a statutory right to choose, by a self-determination election, to be represented by the Union or to remain unrepresented -- and that

this statutory right cannot be taken from them by administrative fiat.

CONCLUSION

The NLRB and the Ninth Circuit disregarded the extensive agency and judicial precedent permitting employees a self-determination election wherever such employees possess a separate group identity.

The uncontroverted evidence, although virtually ignored by the NLRB in its Brief, establishes the historical and factual predicate necessary for the conduct of a self-determination election among the Palo Verde employees, an identifiable separate group.

The law, until this case, has been clear. The position taken by the government throughout this case flagrantly violates the Act and deviates from both administrative and judicial precedents which heretofore have protected employees'

Sections 7 and 9 rights to select an exclusive bargaining representative, or to refrain from selecting one. Although the NLRB like other administrative agencies,

> is entitled to considerable deference when it exercises its "special function of applying the general provisions of the Act to the complexities" of . . . labor relations, . . . the "deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress." [citation omitted] Accordingly, while reviewing courts should uphold reasonable and defensible constructions of an agency's enabling Act [citation omitted], they must not "rubberstamp . . . administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the Congressional policy underlying a statute."

Bureau of Alcohol, Tobacco and Firearms v. Federal Labor Relations Authority, et al., 52 U.S.L.W. 4013, 4015 (U.S. Nov. 29, 1983), citing, NLRB v. Erie Resistor Corp., 373 U.S. 221, 236 (1963), American

Ship Building Co. v. NLRB, 380 U.S. 300, 318 (1965), and NLRB v. Iron Workers, 434 U.S. 335, 350 (1978).

The question before the Court is one which involves a threat to the very foundation of the Act -- the concept of a free and democratic employee choice -- and requires resolution by this Court.

RESPECTFULLY SUBMITTED this 31st day of December, 1983.

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